PUBLIC PROSECUTOR

v.

KELVIN SOH TED POH

HIGH COURT BORNEO, KUCHING
HAIDAR MOHD. NOOR J
[CRIMINAL REVISION NO. KG. 2 OF 1989]
2 JANUARY 1990

CRIMINAL PROCEDURE: *"Memeriksa" as against ujian-ujian - Effect of - Certificate by medical officer or registered medical practitioner - Whether prima facie evidence - Burden of proof - Whether the non usage of prescribed form Borang 2 is fatal to detaining a "drug dependant" for rehabilitation.*

The Magistrate after hearing an objection from the Counsel for the subject in an application under s. 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 released the subject. She then referred the case to the High Court under s. 323 of the Criminal Procedure Code to determine the correctness of her order.

Mr. C.M. Kanavathi, Counsel for the subject objected to the validity of the medical report (Exhibit P1) on 2 grounds.

(a) Firstly it differs in material particular from the prescribed form, i.e., Borang 2 under Kaedah-Kaedah Penagih Dadah (Rawatan dan Pemulihan) (Borang-borang) 1983 (PU (A) 485) in that the word "memeriksa" is used in P1 instead of the word "ujian-ujian" as used in the prescribed Borang 2. Mr. Kanavathi submitted that the failure to use the prescribed form in this case is fatal.

(b) Secondly the certification by the government medical officer is insufficient to classify the subject as a drug dependant within the meaning of s. 2 of the Act.

Held:

[1] The use of the word "memeriksa" instead of the word "ujian-ujian" does not have substantial effect and is not calculated to mislead the Court or the subject.

[2] A certificate by a government medical officer or a registered medical practitioner shall be accepted by a Magistrate as *prima facie* evidence that the person named in the certificate is a drug dependant. The burden shifts to the subject to prove that he is not a drug dependant.

[3] In the circumstances, the objection of Counsel for the subject in this case has no merits. In exercise of my revisionary powers, I hearby set aside the order of discharge of the subject by the Magistrate.

[Order accordingly.]

Cases referred to:

Hoo Thian Siong v. PP [1988] 1 CLJ (Rep) 583
Re Roshidi bin Mohamed [1988] 2 MLJ 193
Andrew s/o Thamboosamy v. Superintendent of Pudu Prison, Kuala Lumpur [1976] 2 MLJ 156
PP v. Koh Yoke Koon [1988] 1 CLJ (Rep) 269
Abdul Karim v. Mohamed Taib & Anor. [1969] 2 MLJ 72

Legislation referred to:

Criminal Procedure Code s. 323

Drug Dependants (Treatment and Rehabilitation) Act 1983, ss. 2, 3, 4, 6(1)(a),(b), 6(3), 6(4), 6(5), Form 2

Interpretation Act 1967, s. 62

For the public prosecutor - Nik Suhaimi

For the subject - Charles Kanavathi; M/s. C.M. Kanavathi & Co.

JUDGMENT

Haidar Mohd. Noor J:

The learned Magistrate, Puan Rhodzariah Bujang, after hearing an objection from the Counsel for the subject in the matter of an application under s. 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ("the Act") released the subject forthwith on 13 June 1989. In making the said order of release the learned Magistrate indicated that she would be referring the case to the High Court under s. 323 of the Criminal Procedure Code to determine the corrections of her order. Subsequently she sent up the record of the proceedings together with her written ruling to the High Court. On going through the record of the proceedings and her written ruling I was of the view that the order made by her on the issue raised needed consideration by the Court and I accordingly decided to hear the parties.

Section 6(1)(a) of the Act reads:

> 6.(1) Where a person who has undergone the tests referred to in ss. 3 or 4, and, in consequence of such tests, in certified by a government medical officer or a registered medical pracitioner to be a drug dependant, the officer shall produce him, or cause him to appear, before a Magistrate and if the Magistrate, after giving such person opportunity to make representation:
>
> (a) is satisfied that such person requires to undergo treatment and rehabilitation at a rehabilitation centre, order such person to reside at such centre for a period of two years to undergo treatment and rehabilitation and thereafter to undergo after-care in accordance with the provisions of this Act relating thereto, or ...

Mr. C.M. Kanavathi, Counsel for the subject, raised objection on the validity of the medical report, (Exhibit P1) on two grounds:

(a) Exhibit P1 differs in material particular with the prescribed form, that is, Borang 2 under Kaedah-kaedah Penagih Dadah (Rawatan dan Pemulihan) (Borang-borang) 1983 (P.U. (A) 485) where the word "memeriksa" is used in P1 instead of the word "ujian-ujian" as used in the prescribed Borang 2. As r. 2 prescribes that the forms to be used for the purpose of the Act **shall** be those appearing in the Schedule, Mr. Kanavathi submitted that the failure to use the prescribed form in this case is fatal as the word "shall" denotes that it is mandatory that the prescribed form be used. He relied on the *obiter dicta* of Mustapha J in *Hoo Thian Siong v. PP* [1988] 1 CLJ (Rep) 583.

(b) The certification by the government medical officer is insufficient to classify the subject as a drug dependant within the meaning of s. 2 of the Act. He cited the case of *Re Roshidi bin Mohamed* [1988] 2 MLJ 193 where it should be noted that the learned Judge merely by way of passing commented on the definition of drug dependant and the proof thereof and no more.

Ground (a)

There is no doubt, in my view, that the medical certificate (P1) issued in this case is not substantially the same as the prescribed Borang 2. The main issue raised is as to the word "memeriksa" in P1 whereas in Borang 2, the word "ujian-ujian" is used. In considering deviations from prescribed forms it is perhaps pertinent to refer to s. 62 of the Interpretation Act 1967 which reads:

> 62. Any written law prescribing a form shall be deemed to provide that an instrument or other document purporting to be in that form shall not be invalidated by reason of any deviation from the form the form if the deviation has no substantial effect and is not calculated to mislead.

In the Malay texts of the Act and the Rules the word "test" is "ujian-ujian". In departing from the use of the word "ujian-ujian" to one of "memeriksa" can it be said that the deviation has substantial effect and calculated to mislead. The word "test" can ordinarily be also translated as "memeriksa" though of course the appropriate translation of that word would be "ujian-ujian" as used in the Act and the Rules but then the word "memeriksa", in my view, is not totally out of the meaning of the English word "tests" and it remains as to how one construe the meaning of the word "memeriksa". In any event I am of the opinion that the use of the word "memeriksa" does not have substantial affect and is not calculated to mislead the Court or the subject as that word is related to the subsequent sentence in P1 that the government medical officer must certify whether the subject is a drug dependant or not. The word "ujian-ujain" is defined in s. 2 of the Act as:

> semua perbuatan atau prosedur yang di jalankan bagi maksud menentukan sama ada seseorang itu penagih dadah.

It is really the choice of words used and if the word used is not materially different in meaning as to one used in the prescribed form I do not see how the Court or the subject is in any way misled or the deviation has substantial effect. There are abundant authorities to show that the law of preventive detention (as is applicable in this case) must be construed strictly and in case of doubt the Court should lean in favour of the subject (see *Andrew s/o Thamboosamy v. Superintendent of Pudu Prison, Kuala Lumpur* [1976] 2 MLJ 156 and *PP v. Koh Yoke Koon* [1988] 1 CLJ (Rep) 269. However, for the reasons as I said earlier the deviation in the use of the word "memeriksa" instead of "ujian-ujian" has under no circumstances misled or has a substantial effect so as to invalidate P1 (see *Abdul Karim v. Mohamed Taib & Anor.* [1969] 2 MLJ 72). However, the prosecution is well-advised to direct the appropriate authorities to adhere to the use of the prescribed Borang 2 or other forms as are prescribed under the Rules so as to avoid the unnecessary technicalities that may be raised.

Ground (b)

Under s. 6(1) of the Act a Magistrate before making an order under s. 6(1)(a) or 6(1)(b) in respect of a drug dependant, that person must undergo the tests referred to in ss. 3 or 4 and in consequence of such tests, is certified by a government medical officer or a registered medical practitioner to be a drug dependant.

"Tests" is defined under s. 2 of the Act as :

> all such acts or procedures as may be carried out for the purpose of determining whether a person is a drug dependant.

"Drug dependant" is defined under s. 2 of the Act as:

> a person who through the use of any dangerous drug undergoes a psychic and sometimes physical state which is characterised by behavioural and other responses including the compulsion to take the drug on a continuous or periodic basis in order to experience its psychic effect and to avoid the discomfort of its absence.

It would appear therefore that a Magistrate acts on the medical certificate of a government medical officer or a registered medical practitioner who will certify a person to be a drug dependant before making an order under s. 6(1)(a) or (6)(1)(b) of the Act as the case may be. Before issuing a certificate under subsection (1) of s. 6, the government medical officer or the registered medical practitioner will have to conduct tests on that person. The tests to be conducted will be "all such acts or procedures as may be carried for the purpose of determining whether a person is a drug dependant" as is defined in s. 2. It is thus clear by the definition of "tests" that the law leaves it to the government medical officer or the registered medical practitioner to determine the acts or procedures to be carried out in certifying a drug dependant. It would follow therefore that in carrying out the tests and determining a person as a drug dependant the government medical officer or the registered medical practitioner will have to bear in mind of the definition of 'drug dependant' in s. 2 of the Act. The prosecution need only produce the medical certificate under s. 6(1) and **no more for** a Magistrate to act under s. 6(1)(a) or 6(1)(b) of the Act as the case may be. In my view therefore there is absolutely no necessity for the prosecution in this case to produce the annextures to P1 purporting to show the tests carried out. In fact subsection 5 of s. 6 allows for the medical certificates like P1 to be receivable in evidence without proof of the signature and its contents be accepted unless the contrary is proved.

Subsection 5 reads:

> (5) A certificate under subsection (1) purporting to be signed by a government medical officer or a registered medical practitioner shall be receivable by a Magistrate without proof of the signature thereon, and the Magistrate shall accept it as proof of its contents, unless the contrary is proved.

In other words, a certificate by a government medical officer or a registered medical practitioner shall be accepted by a Magistrate as *prima facie* evidence that the person named in the certificates is a drug dependant. The words "unless the contrary is proved" denote that the burden shifts to the subject if he disagrees with the certificate that he is a drug dependant by calling the government medical officer or the registered medical practitioner, as the case may be, to cross-examine on the tests conducted or to call such other relevant evidence as to challenge the certification given so as to show that he is not a drug dependant within the meaning in s. 2 of the Act. In making an order under s. 6(1)(a) or 6(1)(b) of the Act, a Magistrate needs only to take into consideration also the report of a Rehabilitation Officer under s. 6(3) and shall also have regard to the "circumstances of the case, and the character, antecedents, age, health, education, employment, family and other circumstances of the person" under s. 6(4) of the Act. In the result the objection of learned Counsel for the subject in this case has no merits.

In the circumstances I would, in exercise of my revisionary powers, set aside the order of discharge of the subject by the learned Magistrate and would direct the subject to appear before her on 15 January 1990 to be dealt with in accordance with s. 6 of the Act. In dealing

with this matter the learned Magistrate will no doubt consider the report of the Rehabilitation Officer (P2) as required under s. 6(3) which appears to recommend for an order under s. 6(1)(b) of the Act. Pending his appearance in the Magistrate Court, the subject is to execute a bound with one surety in the sum of RM1000.

Also found at [1990] 1 CLJ 542